No. 80-1135

In the Supreme Court of the United States

OCTOBER TERM, 1980

HEDSTROM COMPANY, A SUBSIDIARY OF BROWN GROUP, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that petitioner's violations of the National Labor Relations Act, which included both extensive threats of plant closure and numerous other unfair labor practices, precludes the holding of a fair representation election and therefore warranted the issuance of a bargaining order based on authorization cards.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-45a) is reported at 629 F. 2d 305. The Board's supplemental decision and order on remand (Pet. App. 92a-107a) and the Board's decision and order in a related case (Pet. App. 46a-91a) are reported respectively at 235 N.L.R.B. 1193 and 235 N.L.R.B. 1198. The opinion of the court of appeals (Pet. App. 108a-141a) remanding the Board's original decision and order is reported at 558 F. 2d 1137. The Board's original decision and order (Pet. App. 142a-221a) are reported at 223 N.L.R.B. 1409.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1980. The petition for a writ of certiorari was filed on January 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

> 1. Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.
>
> 2. Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *

(5) to refuse to bargain collectively with the representatives of his employees * * *.

3. Section 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in [an] unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

4. Section 10(e) * * * No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances * * *.

STATEMENT

1. In early 1974, the Union[1] waged an organizational campaign at petitioner's plant in Bedford, Pennsylvania, and obtained signed authorization cards from 128 of the plant's 249 employees. On March 28, 1974, the Union lost a Board representation election at the plant by a vote of 125 to 113 (Pet. App. 2a, 148a).

In an ensuing unfair labor practice proceeding, the Board held that, prior to the election, petitioner committed a total of 42 unfair labor practices to undermine the Union's support, in violation of Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1). The Board found that, in incidents involving a

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[1]International Association of Machinists and Aerospace Workers, District No. 98, AFL-CIO.

total of 18 employees, Plant Manager William Griffiths unlawfully interrogated employees, solicited grievances from employees, promised and granted benefits to employees, and threatened employees with plant closure (Pet. App. 2a-3a, 144a-145a, 171a-187a). The Board also found that, in incidents involving a total of 16 employees, nine plant supervisors unlawfully interrogated employees, solicited grievances from employees, promised benefits to employees, conveyed impressions of surveillance to employees, warned employees of an impending Union strike call, and threatened employees with reduced benefits, more onerous work rules, discharge, and plant closure (*id.* at 3a, 144a-145a, 187a-205a). The Board further found that, within the two days preceding the election, Company President Lee Ketcham impliedly threatened all of the employees with plant closure by referring to petitioner's "unhappy experience" with the Union at its former plant in Fitchburg, Massachusetts, and that Ketcham's implied threat was reinforced by a local newspaper story on the day of the election stating that petitioner's "bitter experience" with the Union at Fitchburg had caused that plant to close (*id.* at 3a, 144a-145a, 163a-168a, 206a-211a). Finally, the Board found that Ketcham unlawfully threatened an employee with discharge and that petitioner unlawfully refused to recognize and bargain with the Union (*id.* at 3a, 145a-146a).

Applying this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Board concluded that petitioner's "extensive and far-reaching" unfair labor practices required the election to be set aside, that there was "little or no likelihood" of holding a fair rerun election, and that issuance of a bargaining order based on the Union's authorization card majority was warranted (Pet. App. 3a-4a, 146a-153a).

2. On the company's petition for review, the court of appeals upheld all of the Board's unfair labor practice findings except the findings that Ketcham unlawfully threatened

an employee with discharge and that petitioner unlawfully refused to recognize and bargain with the Union (Pet. App. 4a, 114a-130a). With respect to the question of relief, the court remanded the case to the Board for reconsideration of the need for issuance of a bargaining order because (1) the Board had failed to make "specific findings" and a "detailed analysis" concerning the continuing effect of petitioner's unfair labor practices, the likelihood of recurrence of those unfair labor practices, and the possibility of holding a fair rerun election; (2) two of the Board's unfair labor practice findings had been overturned by the court; and (3) the Board had failed to assess the impact of the election day newspaper article and the intervening passage of time on the possibility of holding a fair rerun election (*id.* at 4a, 135a-141a).

3. In its supplemental decision and order on remand, the Board, again applying this Court's *Gissel* decision, specifically concluded "that 'the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, [was] slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order * * *' " (Pet. App. 101a, quoting 395 U.S. at 614-615).

As to the seriousness and continuing effect of petitioner's unfair labor practices, the Board determined (Pet. App. 99a-101a):

> [W]e note at the outset that the possibility of plant closure in the face of unionization was an issue which loomed large in the election campaign. The Board has long held that the threat of job loss through plant closure has a seriously coercive effect on employees' freedom of choice in the election of a collective-bargaining representative. * * *

> Further, in *Gissel*, * * * the Supreme Court recognized the serious impact of such threats when it made reference to a study which showed that threats to close or transfer plant operations were more effective in destroying election conditions for a longer period of time than were other types of unfair labor practices [citing *Gissel*, *supra*, 395 U.S. at 611 n.31].
>
> [Petitioner's] employees were exposed to the threat of plant closure throughout the campaign. * * * [Both] high- and low-level supervisors unlawfully raised the Fitchburg example to the employees during the campaign, and impliedly threatened Bedford employees with the same fate in the event that they selected the Union. Indeed, [petitioner's] president, Ketcham, ended the campaign with a speech to all employees which raised the spectre of the "unhappy experience" at Fitchburg.
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> * * * * * *
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> In addition, [petitioner's] intensive antiunion campaign included approximately 40 unfair labor practices, demonstrating [petitioner's] willingness to exceed the limits of the law in its attempt to prevent unionization. It may reasonably be inferred that the total effect of the threats of closure, and the numerous other unfair labor practices against the background of the general awareness of the Fitchburg experience, was to instill in employees a strong fear of loss of employment that would continue to be operative even in the event of a second election.

With respect to the rejection of two of its unfair labor practice findings by the court of appeals, the Board concluded (Pet. App. 101a, 104a-105a):

> [Our] conclusion is not significantly affected by the reviewing court's reversal of our finding that President

> Ketcham violated Section 8(a)(1) by threatening to fire an employee. The reversal does not disturb any of the findings concerning the threats of plant closure, or the overall context in which those threats occurred, which form the basis for our conclusion that a bargaining order is warranted.
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> * * * * *
>
> The court's conclusion with respect to the violation [of Section 8(a)(5)] was based upon the fact that the Union demanded recognition 3 days before it achieved majority status and made no further demand after achieving such status. * * * As a result of the court's finding, we are presented with a case where no effective demand for recognition was made and where a bargaining order is nevertheless required to remedy the effects of [petitioner's] unfair labor practices. We shall therefore issue an order in accordance with our established practice in such cases.

Regarding the newspaper article, the Board, while stressing that issuance of a bargaining order would be warranted even without the article (Pet. App. 100a n.9), found (*id.* at 100a-101a):

> [The article] appeared on the morning of the election and recounted the Fitchburg experience and suggested that [petitioner's] expansion plans might be adversely affected by the presence of a union on the scene. Thus, the fears engendered by the implied threats of company officials and supervisors were articulated in an article published by an independent source. This article would tend to reinforce the employees' belief that [petitioner's] threats were not merely campaign rhetoric, but serious admonitions regarding the consequences of unionization.
>
> * * * * *

> [The employees'] strong fear of loss of employment * * * could only have been exacerbated by the publication of the newspaper editorial.

As to the effects of the passage of time, the Board concluded (Pet. App. 103a-104a):

> [T]he effect of [petitioner's] threats of plant closure and its extensive unfair labor practices during the course of the campaign was to instill in employees the fear that they would lose their jobs through plant closure if the Union won the election. There is nothing to indicate that this fear has been erased during the past three years. To the contrary, recent events indicate that [petitioner's] vigorous opposition to the Union continues to result in unfair labor practices, thereby sustaining, reinforcing, or increasing the fear that [petitioner] might still carry out its earlier threat to close operations if the Union prevails. Thus, in a [related] case issued this day,[2] we find that [petitioner] violated Section 8(a)(3) and (1) of the Act by terminating employee Ritchey, a union member who participated in and actively supported the Union's strike against [petitioner], at a time when she had been neither provided with an adequate offer of reinstatement nor permanently replaced after the strike ended. In addition, [petitioner is] found to have violated Section 8(a)(1) through Plant Manager Griffiths' interrogation and solicitation of grievances of an employee, and through Foreman Ferguson's threat that an employee had no job and that the strike was futile because the Union would never get a contract. Finally, we [find] that

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[2] *Hedstrom Company*, 235 N.L.R.B. 1198 (1978) (Pet. App. 46a-101a). This case involves unfair labor practices committed by petitioner during and after a strike called to protest its refusal to comply with the Board's first bargaining order.

> [petitioner], through President Ketcham, violated Section 8(a)(1) by threatening employee England with more onerous work conditions as a result of her participation in the strike. In these circumstances, we find that a bargaining order is still necessary despite the passage of time from the date of [petitioner's] earlier unlawful conduct.

4. The court of appeals, sitting en banc, enforced the Board's supplemental decision and order.[3] The court held that the Board, "[o]n the basis of * * * specific findings and after careful consideration of the record on remand," had reasonably exercised its "broad discretion" in concluding "that a bargaining order was still necessary to protect the rights of [petitioner's] employees" (Pet. App. 14a). The court explained (*id.* at 14a-15a):

> In our view, this appeal has all of the elements that * * * are common to those cases in which we have enforced orders to bargain. [Citations omitted.] To begin with, the implied threats at issue were communicated to a "significant percentage of employees in the bargaining unit." [Citations omitted.] Indeed, Company President Ketcham's implied threat of plant closure was made at a meeting involving every Hedstrom employee. Moreover, the unfair labor practices at issue "involved unlawful activity by senior company officials." [Citations omitted.] And, because the findings rest "ultimately on a psychological impact on all the employees that is unlikely to dissipate, the factors undermining the first election would be present at any future election." [Citation omitted.] In addition, the imposition of a bargaining order has been held "especially appropriate" where, as here, "the employer has

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[3]The court also enforced the Board's decision and order in the related unfair practice case against petitioner (see note 2, *supra*).

> demonstrated a history of opposition to unionization, thus suggesting that he will commit more unfair labor practices in a subsequent election campaign, and * * * the employer has engaged in a discriminatory refusal to recall an employee, thus indicating that his anti-union animus is responsible at least in part for the employee turnover." [Citation omitted.]

The court rejected petitioner's contention that the Board should have considered the effect of subsequent events, such as employee turnover, on the need for a bargaining order. The court first found that the issue was not properly raised on appeal (Pet. App. 15a-16a):

> [Petitioner] itself proffered no evidence, no statements, nor additional briefs in the more than nine months that the case was pending before the Board after this Court's remand on July 5, 1977. Nor did [petitioner] move for reconsideration or for leave to adduce additional evidence after the Board issued its decision on remand on April 28, 1978, as permitted by Board Rules and Regulations * * *. Under the circumstances, we find that [petitioner] is thus precluded from asserting this objection on appeal [under Section 10(e) of the Act,] 29 U.S.C. §160(e) * * *.

The court also concluded that petitioner's contention concerning subsequent events was without merit (*id.* at 16a-17a):

> [T]o require the Board to determine whether a continuing majority supports unionization would be "to put a premium upon continued litigation by the employer." [Citation omitted.] For an employer, particularly one with a rapid turnover rate, could hope that the resulting delay would produce a new factual situation which

the Board would then have to consider. In this manner, the employer would be able to avoid any bargaining obligation indefinitely.[8]

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[8] * * * * *

Although substantial employee turnover may well be relevant to the Board's choice of remedy, "the Board may determine that other considerations, such as 'past union activity, employer responses to such activity, and expressions of employee sentiments such as the signing of union cards,' * * * requires the imposition of a bargaining order even when substantial turnover has occurred." [Citation omitted.]

ARGUMENT

In issuing a bargaining order based on authorization cards to remedy petitioner's unfair labor practices, the Board properly applied to the particular facts of this case the principles established by this Court in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). Accordingly, further review is unwarranted.[4]

There is no merit to petitioner's contention (Pet. 7-9) that the Board adopted "a *de facto per se* rule" that threats of plant closure "automatically" call for issuance of a bargaining order based on pre-election membership cards of a majority of employees in the unit. The Board specifically found that a bargaining order was warranted in this case, not only because of petitioner's threats of plant closure, but also because of "the total effect" of petitioner's "numerous other unfair labor practices" (Pet. App. 101a); and the court of appeals concluded that the Board's "specific findings"

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[4] Contrary to petitioner's suggestion (Pet. 8-9), the fact that the administrative law judge concluded that issuance of a bargaining order was not warranted in this case is of no special significance. This Court has stated that, when the administrative law judge and the Board draw different legal conclusions from the same set of facts, the administrative law judge's conclusions are entitled to no "more weight than in reason and in the light of judicial experience they deserve," and the standard of

reflected "careful consideration" of the entire record (*id.* at 14a). Moreover, in *Sinclair Co.* v. *NLRB*, a case decided together with *Gissel*, this Court upheld the Board's issuance of a bargaining order based solely on threats of plant closure (395 U.S. at 587-590, 616-620).[5]

There is also no merit to petitioner's contention (Pet. 12-15) that review by this Court is warranted because the Board should have considered the need for a bargaining order in light of the effect of subsequent events such as employee turnover. Since petitioner never raised this issue before the Board, the court of appeals correctly held (Pet.

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review "is not modified in any way." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 476 (1951). Accord: *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 364-365 (1955).

[5]The Board cases that petitioner contends (Pet. 9-10) conflict with the instant case are distinguishable. In *Coach and Equipment Sales Corp.*, 228 N.L.R.B. 440 (1977), *Florida Steel Corp.*, 223 N.L.R.B. 174 (1976), and *Reeves Distribution Services, Inc.*, 223 N.L.R.B. 995 (1976), there was no finding that the unions had obtained majority support and the propriety of a bargaining order was not even discussed in those cases. In *Allen-Stone Boxes, Inc.*, 252 N.L.R.B. No. 171, 105 L.R.R.M. 1381 (Sept. 30, 1980), the employer's threat of plant closure was made early in the election campaign, was dissipated by subsequent action of the Board's Regional Office, was made only once, was never made explicit, and was combined with only four other unfair labor practices. In *Ludwig Motor Co.*, 222 N.L.R.B. 635, 646-647 (1976), the employer's threat of plant closure was made only once, was not expressly stated, and was accompanied by no other unfair labor practices.

In addition, petitioner incorrectly claims (Pet. 11) that the Board misapplied *Gissel* by basing the issuance of a bargaining order in part on a newspaper's election day references to plant closure. In finding that the newspaper's references to plant closure tended to "reinforce" and "exacerbate" the effect of petitioner's own threats of plant closure (Pet. App. 100a-101a), the Board properly applied *Gissel's* teaching that it should determine the need for a bargaining order by considering "the extensiveness of an employer's unfair practices" in terms of their overall "effect on election conditions" (395 U.S. at 614). In any event, the Board specifically found that a bargaining order would be warranted even without regard to the newspaper's references to plant closure (Pet. App. 100a n.9).

App. 15a-16a) that judicial review of the contention is precluded under Section 10(e) of the Act, 29 U.S.C. 160(e). See *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).[6] In any event, petitioner's proffered evidence would merely show (Pet. 12 n.12) that there has been a 44% turnover of employees and expansion of the plant, rather than closure, since petitioner's unfair labor practices in 1974. This evidence, even if relevant, would not be sufficient to negate the Board's finding that the 1974 unfair labor practices—which were committed during the tenure of nearly 140 employees still working at the plant, were spread by the election day newspaper article to potential new employees in the community, and were reinforced by the subsequent 1976 unfair labor practices at the plant—still warrant issuance of a bargaining order.[7]

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[6]Contrary to petitioner's claim (Pet. 12 n.13), its failure to raise the contention concerning subsequent events before the Board is not excused on the ground that such a contention "would have been futile in light of the Board's explicit position that such evidence is irrelevant and will not be considered." This Court has rejected the proposition that failure to raise an objection before an agency is excused by the existence of "a predetermined policy * * * which would have required [the agency] to overrule the objection if made," since "[r]epetition of the objection in [a large number of like cases] might lead to a change of policy, or, if it did not, * * * would at least * * * [put the agency] on notice of the accumulating risk of wholesale reversals being incurred by its persistence." *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

[7]Petitioner cites (Pet. 13-14) a number of cases in which courts of appeals have held that the Board should consider the effect of subsequent events on the need for a bargaining order. However, the cited cases in no way indicate that consideration of subsequent events would require reversal of the Board's issuance of a bargaining order in the circumstances of this case. On the contrary, *NLRB* v. *Dixisteel Buildings, Inc.*, 445 F. 2d 1260, 1265 (8th Cir. 1971), recognizes that in cases where the employer has committed major unfair labor practices such as

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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threats of plant closure, subsequent events, "while a relevant consideration * * *, cannot be deemed dispositive"; and *NLRB* v. *Jamaica Towing, Inc.*, 632 F. 2d 208, 212-213 (2d Cir. 1980), states that in cases where the employer has committed "hallmark" unfair labor practices such as threats of plant closure, subsequent events need not be considered at all. The cited cases are thus not inconsistent with the position of the court of appeals in this case that "[a]lthough substantial employee turnover may well be relevant * * *, 'the Board may determine that other considerations, such as past union activity, employer responses to such activity, and expressions of employee sentiment such as the signing of union cards' * * * requires the imposition of a bargaining order even when substantial turnover has occurred" (Pet. App. 16a n.8; citations omitted).